Filed 7/17/15 A.W. v. Superior Court CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| A.W.,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,<br><br>Respondent;<br><br>SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES,<br><br>Real Party in Interest. | E063461<br><br>(Super.Ct.No. J251580)<br><br>OPINION |

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Cheryl C. Kersey, Judge. The petition is granted.

Timothy L. Guhin, for Petitioner.

No appearance for Respondent.

Jean-Rene Basle, County Counsel, and Jamila Bayati, Deputy County Counsel, for Real Party in Interest.

In this petition A.W. (Mother), the mother of the minor S.G., challenges the order of the superior court terminating reunification services and setting a selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26.[1] Mother asserts that there was no substantial evidence that return of the minor to her care would be detrimental. We agree, and grant the petition.[2]

STATEMENT OF FACTS

The minor came to the attention of San Bernardino County Children and Family Services (CFS) on July 27, 2013, following a report of neglect from a deputy sheriff performing a "welfare check." When Mother opened the door to the social worker, the smell of feces was noticeable. Feces were found in the hallway and bathroom and the house was so cluttered with paper and trash as to be almost impassable. Exposed food was infested with maggots and there were bugs in the house.

The minor, S.G., then six years old, appeared to be clean and told the social worker that she was playing on the porch because she was not allowed to play outside. Mother had already called a friend (who became the minor's caregiver) to come and pick up the minor.

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[1] All subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified

[2] Father has never played a role in the minor's life and is not involved in this petition.

The deputy told the social worker that when he arrived, the minor was on the porch and Mother was playing video games on her computer. Mother claimed to have been ill and to have lost 100 pounds in the last six months. Mother denied drug use and informed the social worker that she suffered from seizures due to a head injury suffered as a result of domestic violence.[3]

A "Team Decision Making" meeting was not held until October 9, 2013. At that time Mother "perseverated the conversation" and insisted on speaking in a childlike voice. Mother exhibited similar behavior the next day, and told the social worker that she was having a seizure but refused medical attention. Mother expressed suicidal ideation to a counselor. Minor was officially detained on October 16, 2013, and a dependency petition was filed.

By the time the matter came up for the jurisdictional/dispositional hearing, an agreement had been reached under which Mother agreed that the minor would be subject to the court's jurisdiction pursuant to section 300, subdivision (b). (Neglect, impairment by mental or medical condition, history of domestic violence.) The case plan as approved required Mother to comply with medication ordered by her physician(s), engage in counseling, complete a parenting class, and do substance abuse testing as ordered.

The six-month report was filed on June 3, 2014. The social worker reported that Mother was participating in individual and family counseling as well as a parenting class

[3] Mother was not in a relationship with Father at the time; services were eventually terminated as to Father. He plays no further role in this matter.

and a domestic violence program. Drug tests were routinely negative. Her visits were regular and generally appropriate, and enjoyed by the minor. However, Mother continued to manifest medical issues on several occasions as reported by the caregiver supervising visits. On one occasion she appeared "very unsteady and shakey [*sic*]" and "eneded [*sic*] up almost falling down"; on another she "collapsed"; on a third she seemed "very tired" and "unsteady"; on a fourth she was "wobbley [*sic*]" and her eyes kept "rolling back in her head" until she finally lay down on the floor of the lobby at the counselor's office. On other occasions Mother was unable to visit because she did not feel well. Mother was also observed to be unsteady on her feet and at times unable to stand by the social worker.

Mother had indicated that she wanted to see a neurologist but her primary physician had been "out of the office" for several weeks and she had not inquired to see if another doctor in the office could make such a referral.

On June 12, 2014, services were continued.

In October 2014 the social worker conducted an unannounced home visit and found Mother's bedroom "very messy and cluttered" with empty food containers and wrappers. Mother had finally seen a neurologist on October 13, 2014; she had refused to see the neurologist originally assigned to her case because she did not like the medication he prescribed. The social worker felt that services should be terminated due to Mother's "lethargy" in resolving her medical issues. Otherwise, it was acknowledged that Mother had fully participated in her reunification plan.

At the 12-month review hearing on December 12, 2014, Mother provided information about her current medication. After a discussion in chambers, the court continued services to Mother and set the 18-month review hearing under section 366.22 for April 10, 2015. It was also noted that Mother's doctor reported that she had been seizure-free for almost a year.

At this time, and for some time previously, Mother had been living in the home of an elderly man for whom she acted as caregiver. She had progressed to eight-hour unsupervised visits with the minor and no other issues of concern were raised. By April 2015, however, this situation was about to change as the elderly man would be moving to an assisted care facility. Thus, although the social worker now felt that Mother had at least a "moderate" chance of reunifying, he also believed that it would be detrimental to the minor to return her to Mother's custody while her housing situation was "unstable." Accordingly, he recommended that Mother continue to receive services under a "Permanency Planned Living Arrangement" (PPLA)[4] for an additional three months while she attempted to resolve her living situation.[5]

At the hearing, by agreement the court was informed that if she were called, Mother would testify that her current housing situation would last for two more months and that the minor would have her own room. Further, Mother testified that a woman

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[4] Neither counsel cites us to authority for this procedure and as petitioner's counsel admits that it was "not legally likely to be accepted" and does not urge that it should have been, we will not consider this proposal further.

[5] Mother was actively seeking other employment.

friend had offered her and the minor a room should Mother not have found independent housing at the end of that time. The social worker was also questioned by the court, and when asked if Mother had stable housing, responded "I do not know."

The trial court found that continuing services was not an appropriate option at the 18-month review hearing, commenting that Mother had already had "a significant amount of time to maintain stable housing and stable employment . . . ."[6] Accordingly, it set a hearing under section 366.26 to establish a permanent plan for the minor. Mother was encouraged to file a changed circumstances petition under section 388 if she obtained new housing.

DISCUSSION

Petitioner argues that there was insufficient evidence of detriment because she *did* have stable housing lined up at the time of the hearing and there was no other basis for a finding of detriment. We agree.

At each review hearing prior to permanency planning, there is a statutory presumption that the minor will be returned to parental custody unless there is a *substantial* risk of detriment to the minor, and this standard is a "fairly high one." (*In re E.D.* (2013) 217 Cal.App.4th 960, 965.) The crucial question is whether the parent shows a grasp of basic parenting concepts (a child's need for food, security, shelter, proper sanitation, healthcare, etc.) and appears capable of applying them. It is not relevant

[6] In fact this is inaccurate. Mother *had* been regularly employed and *had* had stable housing. The only indication in the record is that Mother told the social worker of the looming termination of her employment and housing on March 23, 2015.

whether an alternative available placement might be deemed better. (See *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 789-790.) The burden of showing detriment is on the public agency. (§ 366.22, subd. (a).)[7] We review, however, under the "substantial evidence" standard. (*In re E.D.*, *supra,* at p. 966.)

At the hearing, Mother's counsel introduced the evidence noted above concerning Mother's living situation. To wit, that she could remain in her current home for two months and that she and the minor could stay with a friend thereafter if necessary. The fact that the social worker did not know if Mother had stable housing based on the fact that this information had not been previously communicated to him does not constitute substantial evidence that Mother could not provide a home for the minor for the foreseeable future.[8]

It is important to note that the social worker's reluctance to fully recommend reunification at the 18-month review hearing was *solely* based on Mother's supposed lack of stable housing. Mother had participated fully in her plan and there is nothing in the record that constitutes substantial evidence that she was unable to provide appropriate care for the minor. Her medical issues had largely stabilized and she was receiving necessary care and medication. Extended visits with the minor had been successful. Although the social worker in October 2014 had found Mother's room to be "messy

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[7] As petitioner notes, if she does file a motion under section 388, *she* will bear the burden of establishing a right to relief.

[8] We also note that the record does not support any premise that Mother had had difficulty in the past providing a home for the minor.

and cluttered," this evidently did not raise such concerns as would have prevented the minor from visiting in the home. Further, at the social worker's most recent visit in March 2015, Mother's room and the entire house were neat and clean.[9]

Hence, we conclude that there was no substantial evidence of detriment before the trial court.[10]

In an attempt to avoid reversal of the ruling, CFS argues that it would have been detrimental to return the minor to Mother's custody on *other* grounds. The impropriety of this we think is obvious.

First, CFS asks that we take judicial notice of several documents not presented to the trial court. It argues that receipt of postjudgment evidence may be appropriate (but see *In re Zeth S.* (2003) 31 Cal.4th 396, 413) without acknowledging that the evidence it wishes this court to consider dates from *before* the section 366.26 hearing and could therefore readily have been brought to the trial court's attention. Furthermore, the documents are in no way probative.

CFS wants this court to consider a police report prepared with respect to child cruelty charges (Pen. Code, § 273a) by the same deputy who reported the situation to CFS. This report is based upon the same "disgusting house/feces/bugs/maggots"

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[9] CFS states the obvious: "That does not mean Mother would keep it that way . . . ." But such doubts are not *evidence*. (See *People v. Smith* (2005) 37 Cal.4th 733, 755.)

[10] This conclusion makes it unnecessary for us to discuss whether homelessness alone justifies the refusal to return a minor to parental care. (See *In re P.C.* (2008) 165 Cal.App.4th 98, and *In re G.S.R.* (2008) 159 Cal.App.4th 1202.)

evidence set out at the beginning of this opinion.[11] It adds nothing to our evaluation of Mother's original derelictions and still less to an analysis of her ability to care for the minor at the time of the 366.22 hearing.

CFS then wants us to take judicial notice of a minute order for Mother's arraignment on charges under Penal Code section 273a on March 26, 2014, at which time she was not present and a warrant was issued. According to CFS, this establishes that Mother is a "fugitive." Whether this charge (a misdemeanor) remains viable at this time is a point on which we decline to speculate. We also decline to speculate on what actions the People might take with respect to the case. Finally, we decline to find that the fact that Mother did not appear in court has any bearing on her fitness as a parent. Accordingly, the request for judicial notice is denied.[12]

CFS then flatly states that "Mother did not adequately correct the problems that led to S.G.'s removal from her; she lacked stable housing and employment, and could not provide for S.G.'s basic needs." As we have found above, Mother *did* have appropriate housing and there was *no* evidence that she was otherwise unable to provide for the minor's needs.

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[11] The circumstances under which this report was prepared are unclear. CFS was called on July 27, 2013, and from the detention report it appears that the minor was put in the care of Mother's friend at that time. How she came to be back at the home by September 1 is not reflected in the record. Apparently, however, this was the *second* welfare check by the deputy.

[12] The request also contains lengthy arguments concerning Mother's unfitness which have no relevance to the question of whether judicial notice should be taken.

CFS then insinuates that Mother's medical condition remained problematical, noting that reports in the record concerning her lack of seizures and increased energy were based on Mother's reports.[13] Instead, CFS thinks the court should have accepted the *caregiver*'s statement that Mother is "sick" despite the latter's clear bias. By impressively circular reasoning, CFS then argues that because Mother is lying about the fact that her current treatment and medication has helped her feel more normal, she "lacks awareness" and "one cannot rely upon Mother's word concerning her parental fitness." There is really nothing to be done with such an argument but to reject it.[14]

CFS then relies on the minor's *caregiver*'s statements of frustration at Mother's supposed failure to get a job (she had one) or apply for disability as showing a substantial risk of detriment; again, this is unpersuasive. And insofar as CFS relies on the caregiver's statement that the minor would prefer to stay in her current placement, a child's wishes alone do not justify a refusal to return to parental custody. (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1403.)

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[13] CFS sets out in detail the incidents, most of which we also recited in the body of this opinion, concerning Mother's difficulty in walking and weakness as observed during visits. The most recent dates from October 2014. CFS claims this history shows that Mother was "dishonest" about her current functioning. We disagree.

[14] CFS correctly asserts that the trial court was not required to believe the doctor's report of Mother's improvement, based as it was on Mother's self-report. But the trial court expressed *no concerns* about Mother's health. CFS apparently wants this court to make a factual finding contrary to that implied in the trial court's statements. We decline to do so.

CFS's final point—that the trial court properly refused to extend services—is moot, due to our finding that the minor should have been returned to Mother's custody at the time of the decision.

DISPOSITION

The petition for extraordinary writ is granted. Let a peremptory writ issue, directing the superior court to vacate its order terminating reunification services, and to enter a new order returning the minor to Mother's physical custody.

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McKINSTER
Acting P. J.

We concur:

KING
J.

MILLER
J.